



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 289 OF 2011

IN THE MATTER OF ESTATE OF THE LATE STEPHEN NTHIW'A KILULUI (DECEASED)

JACKSON MUTUKU NTHIW'A.....APPLICANT/2ND ADMINISTRATOR

VERSUS

JACKSON MUTUKU NTHIW'A.....RESPONDENT/1ST ADMINISTRATOR

R U L I N G

1. Before me is a notice of motion brought under Rule 73 of the Probate and Administration Rules dated 25th November, 2015 and filed one year later on the 25th November, 2016 wherein the applicant seeks orders to compel the respondent, who is his co-administrator to surrender the original titles No Mavoko Town Block 3/287 and Mavoko Town Block 3/2517 to the land registry- Machakos and in the alternative an order be issued to gazette the titles as lost so that other titles be issued.

2. The facts of the case are that the 1st administrator only signed transfer forms but did not surrender the original title deeds. The applicant is unable to secure them and in view of the clandestine manner in which the process was being undertaken, the safest way was to obtain a court order to that effect to compel him to surrender the titles or they be deemed as lost and the loss be gazetted.

3. The 1st administrator has in reply cast doubt on the motive of the 2nd administrator, a fact that the 2nd administrator has not disputed, and in this regard has annexed a letter informing the 2nd administrator objecting to any transactions on the land for the family has not consented. In addition, he has annexed an alleged subdivision scheme of the land to which the titles relate and states that the applicant has intentions of issuing titles contrary to what was agreed on by the family and contrary to the terms of the confirmed grant.

4. Parties were directed to file submissions and only the applicant's submissions are on record, the said submissions echo the averments in the applicant's affidavit.

5. After going through the pleadings, the issue that I am left to determine is whether the applicant deserves the order sought.

6. The applicant relies on Rule 73 of the Probate and Administration Rules provides as follows:

Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

7. It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The Black's Law dictionary defines abuse as

"Everything which is contrary to good order established by usage that is a complete departure from reasonable use" An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.

8. In *Agnes Muthoni Nyanjui & 2 Others Vs Annah Nyambura Kioi & 3 Others* the court held that:-

"The concept of abuse of court/judicial process involves circumstances and situations of infinite variety and conditions. It has one common feature which is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice. It is recognized that the abuse of judicial process may lie in both a proper or improper use of the process in litigation. Note the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the imitation and annoyance of his opponent and the efficient and effective administration of justice.

In the words of **Oputa J.S.C.**(as he then was) in the Nigerian case of *Amaefule & other Vs The State* he defined abuse of judicial process as:-

“A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process.”

9. I find that the affidavit evidence of the applicant is not credible. Furthermore, I find that he cannot demonstrate the usefulness of this application. The application presented did not demonstrate that the applicant made any request for the titles from the respondent and he refused. *A priori*, he has not presented any evidence to show that he served the applicant with a request for the original titles, and the same was ignored. The manner in which the applicant seeks quick processing of the transaction and or titles tends to give an impression that he has something to hide. That the applicant seeks to further this through misuse of court process and with a bad motive. Obviously the court cannot declare the titles as lost when they are in the possession of one of the administrators.

10. After carefully examining the evidence adduced before me and the papers filed in this court and the emptiness of the application and after carefully analyzing the provision of Rule 73 cited above, I conclude that the applicant has abused the court process with the sole motive of dealing in the said land in a dishonest manner.

11. This brings me to the issue of burden of proof. It is trite law that all cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon in *Rhesa Shipping Co SA v Edmunds*** remarked:-

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

12. Needless to say that the applicant has pushed me to address the issue as to whether or not he has discharged his burden and met the standard as to warrant the orders sought.

13. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of **Miller vs Minister of Pensions**, **Lord Denning** said the following about the standard of proof in civil cases:-

‘The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability.....if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’

14. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist. In light of my above analysis, I respectfully conclude that the evidence tendered by the applicant is manifestly wanting and I hereby find that he has failed to meet the required standard thus the applicant’s claim cannot be sustained for want of proof.

15. In the circumstances, I find that the applicant has not made out a case for the grant of his application in terms of prayer No. (a) and (b) of the Notice of Motion dated 25th November, 2015 and filed one year later on the 25th November, 2016. I therefore shall not grant his application in that regard. The Application is dismissed with costs to the Respondent.

It is so ordered.

Signed, Dated and delivered at Machakos this 22nd day of November, 2018.

D.K. KEMEI

JUDGE